HSBC BANK MALAYSIA BHD v. DATO' SERI MOHAMAD KHIR TOYO & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[SUIT NO: WA-22NCC-189-05-2016]
28 OCTOBER 2016

CONTRACT: *Agreement – Breach – Breach of facility agreement – Borrower failed to make prompt and punctual payments of sums owing under agreement – Claim by bank for repayment – Property forfeited by Government due to criminal conviction of one of the borrowers – Whether borrowers liable to pay following forfeiture order – Whether it was implied term of agreement that it was only valid for as long as borrowers continue to own, control and occupy property – Whether agreement frustrated by forfeiture of property – Contracts Act 1950, s. 57(1) & (2)*

CIVIL PROCEDURE: *Summary judgment – Triable issues – Whether applicant satisfied preliminary requirements for proceedings under O. 14 of Rules of Court 2012 – Whether case comes within order – Whether summary judgment ought to be entered against defendants*

Pursuant to a facility agreement executed between the plaintiff and the defendants, the former granted to the latter a facility in the sum of RM3,000,000 to finance the latter's purchase of a property. The property was charged by the defendants, as owners, in favour of the plaintiff ('the charge'). When the defendants neglected to make prompt and punctual payments of the owing sum under the facility, the plaintiff commenced the present application for summary judgment under O. 14 of the Rules of Court 2012 ('the ROC'), claiming for repayment of the same. In resisting the plaintiff's application, the defendants submitted that they were no longer answerable for the facility as the property has been forfeited by virtue of an order of the Federal Court ('the forfeiture order') due to the conviction of the first defendant for a criminal offence under s. 165 of the Penal Code. The issues that arose for the court's adjudication, as raised by the defendants, were (i) whether the defendants were liable under the facility agreement following the forfeiture order; (ii) whether it was an implied term of the facility agreement that it was only valid for as long as the defendants continued to own, control and occupy the property; (iii) whether the facility agreement was frustrated by the forfeiture of the property, as provided by ss. 57(1) and (2) of the Contracts Act 1950 ('the CA'); (iv) whether the plaintiff should first pursue the foreclosure of the charge before suing the defendants; (v) whether the plaintiff should have taken steps to enforce its rights under the charge *vis-a-vis* the Government; (vi) whether the forfeiture order was meant to protect the interests of the plaintiff and the second

defendant; (vii) whether the Government should be made a third party since it had secured the forfeiture of the property upon conviction of the first defendant; and (viii) whether there were triable issues that did not justify summary judgment be entered against the defendants.

Held (allowing application; granting summary judgment):

(1) There was no basis for the contention that the forfeiture order had the effect of extinguishing the facility or obligations of the defendants to make prompt and punctual payments of the sums owing. It was difficult to appreciate how the forfeiture order or the underlying criminal proceedings could have any relevance to the contractual relationship between the plaintiff and the defendants under the facility agreement. (paras 13 & 14)

(2) There was no evidence to support the defendants' contentions that (i) their continued ownership, control or occupation of the property ought to be construed as being 'implied terms' in the facility agreement; and (ii) there were pre-contractual representations made by the plaintiff to the defendants to such effect. The argument of implied terms must fail because it is so well-established that where the terms of a contract are clear and unambiguous, extrinsic evidence could not be introduced to contradict the contract. The court is required to construe the contracts in its literal and natural meaning and within the four corners of the document in order to give effect to the intentions and bargains of the parties. There was nothing that permitted the defendants to be released of their obligation on the grounds even remotely related to their no longer owning or residing in the property. (paras 15, 16, 18 & 22)

(3) Even though, following the forfeiture order, the property was no longer legally under the ownership of the defendants, this did not affect the obligations of the parties under the facility agreement and the charge. The defendants' obligation was to repay and this obligation remained intact. Furthermore, the property continued to be the security for the facility under the charge even though it no longer belonged to the defendants. Accordingly, there was no frustration of contract since there was absolutely nothing that operated as a supervening element that prevented the defendants from making payments to the plaintiff. Their refusal to pay was a clear case of an intentional breach. Section 57 of the CA was of no application to the situation encountered by the defendants. (paras 30, 31, 34 & 35)

(4) Following a default, a lender is fully entitled to pursue any of its remedies either concurrently or successively, unless there is an agreement to the contrary. Under the facility agreement, there was no agreement compelling the remedy of enforcing the charge to be first

initiated by the plaintiff. Instead, the contractual term plainly provided for the right of the plaintiff to pursue the various remedies concurrently. There was no requirement that the plaintiff must pursue any specific remedy such as foreclosure prior to resorting to any of the other options. (paras 42, 43 & 47)

(5) There was no necessity for the plaintiff to take any legal or validating steps to assert or affirm its rights as chargee in respect of the charge of the property. The plaintiff could decided to take action to enforce the charge as it deemed fit. (paras 50 & 51)

(6) The defendants were correct in stating that the forfeiture order protected the interests of the plaintiff. However, it was not correct for them to state that the forfeiture order was to protect the interest of the second defendant. The second defendant was a co-borrower and was equally bound by the expressed promises made by her in the facility agreement and the charge. (paras 55 & 56)

(7) The fact that the property subject to the charge had been forfeited did not change the contractual promises made by the parties. The Government had nothing to do with the contractual relationship between the plaintiff and the defendants. Any dispute between the borrower and a third party is wholly irrelevant and does not raise any triable issue *vis-a-vis* the borrower's liability to repay the facilities granted by the bank to the borrower under the relevant loan agreement. (paras 60 & 61)

(8) In every application under O. 14 of the ROC, the first considerations are (i) whether the case comes within the order; and (ii) whether the plaintiff had satisfied the preliminary requirements for proceedings under O. 14, namely, (a) the defendants must have entered an appearance; (b) the statement of claim must have been served on the defendants; and (c) the affidavit in support of the application must comply with the requirements of O. 14 r. 2 of the ROC. As the plaintiff had satisfied these preliminary requirements and this was not disputed by the defendants, the burden was firmly on the defendants to show that there was a triable issue that did not justify summary judgment being entered against the defendants. The defendants plainly failed, on a balance or probabilities, to raise any triable issue or reasonable defence to resist the plaintiff's summary judgment application. (paras 8, 9, 69 & 70)

Case(s) referred to:

Attorney General of Belize & Ors v. Belize Telecom Ltd [2009] UKPC 10 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Bank Simpanan Nasional v. Tham Lai Ling [2016] 6 CLJ 880 HC ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***
Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 CA ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Malayan Banking Bhd v. Chua Keng Leng [1991] 3 CLJ 2522; [1991] 3 CLJ (Rep) 224 HC ***(refd)***
Malayan Banking Bhd v. Karnival Dagang Sdn Bhd & Ors [2012] 1 LNS 605 CA ***(refd)***
Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294 CA ***(refd)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Voo Min En & Ors v. Leong Chung Fatt [1982] 1 LNS 47 FC ***(refd)***
Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, s. 36(1)
Contracts Act 1950, s. 57(1), (2)
Evidence Act 1950, ss. 91, 92
Penal Code, s. 165
Rules of Court 2012, O. 14 r. 3

For the plaintiff - Jeyanthini Kannaperan & Low Pou Leen; M/s Shearn Delamore
For the defendants - Adzly Ab Manas & Wan Ashrul Afham; M/s Adzly & Co

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This case concerns an application by the plaintiff for summary judgment against the defendants, as documented in encl. 4. I allowed the same at the conclusion of the hearing, and stated my key reasons for the same. This judgment contains the full reasons for my decision.

Key Background Facts

[2] In pursuance of letters of offer dated 31 May 2007 and 8 August 2007 issued by HSBC Bank Malaysia Berhad ("the plaintiff"), and duly accepted by the defendants as borrowers; and of a facility agreement dated 8 August 2007 executed by the plaintiff and the defendants ("the facility agreement"), the plaintiff granted to the defendants a HomeSmart Facility of RM3,000,000 ("the facility") to finance their purchase of Lot 8 and 10, Jalan Suasa 7/1L, Shah Alam, which is held under HS (D) 22904 dan HS (D) 22905, PT 62 dan PT 65, respectively, Bandar Shah Alam, Mukim Petaling, Selangor ("the property"). As part of the security arrangement for the facility, the property was charged by the defendants, as owners, in favour of the plaintiff ("the charge").

[3] Given the failure by the defendants to adhere to the terms and conditions of the facility agreement, particularly in having neglected to effect prompt and punctual payment of the principal and interest sums falling due on the facility, the plaintiff, through its solicitors issued a letter of demand dated 13 April 2016 terminating and cancelling the facility, and demanding for the payment of the outstanding amount of RM2,377,851.72 due under the facility as at 11 April 2016 within 14 days of the date of the said letter.

[4] As no payments were forthcoming from the defendants in response to the said letter of termination and demand, the plaintiff commenced a writ action for repayment of the facility and for that purpose filed the instant summary judgment application, claiming payment of the said outstanding sum of RM2,377,851.72 as at 11 April 2016, as well as the applicable interest thereon from 12 April 2016 until full settlement date, and costs on solicitors and client basis.

[5] The defendants resisted this application. Their opposition essentially revolves around the contention that they ought no longer to be held answerable for the facility given the fact that the property has since been forfeited following the conviction of the first defendant for a criminal offence.

Evaluation And Finding Of This Court

The Law

[6] This is an application for summary judgment under O. 14 of the Rules of Court 2012. It is well-established and already settled law that once an O. 14 application is demonstrated to be correctly and properly filed, the burden shifts and thus rests on the defendant who seeks to resist the application to raise a defence which shows a "*bona fide* triable issue", in the sense of an issue which justifies and warrants the matter to be considered at the trial proper.

[7] This is entirely in keeping with the requirements of O. 14 r. 3 of the RC 2012 which provide that unless the defendant satisfies the court with respect to the claim, or part of a claim, to which the application relates that:

(a) there is an issue or question in dispute which ought to be tried; or

(b) there ought for some other reason to be a trial of that claim or part,

the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

[8] Thus in the often quoted decision of the former Supreme Court in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300 it was authoritatively ruled as follows:

> We think it appropriate to remind ourselves once again that in every application under Order 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
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> … If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him.

[9] As the plaintiff has satisfied these preliminary requirements, and this is not disputed by the defendants, the burden is now firmly on the defendants to show that there is a triable issue that does not justify summary judgment be entered against the defendants. If the defendants can show even one triable issue, this court will not grant summary judgment. But it has to be a genuinely triable issue. As made clear by the Federal Court in *Voo Min En & Ors v. Leong Chung Fatt* [1982] 1 LNS 47; [1982] 2 MLJ 241, it is insufficient for a defendant to raise an issue or any issue. The defendant must instead raise such issue as would require a trial in order to determine it.

The Issues Raised By The Defendants

[10] I will now consider each of the issues raised by the defendants in the affidavit affirmed on 29 June 2016 by the first defendant on behalf of both defendants and repeated in the written submissions and highlighted in the oral submissions at the hearing, in their opposition to this summary judgment application.

First Issue – Whether The Defendants Are No Longer Liable Under The Facility Agreement Following The Forfeiture Order

[11] The first defendant was convicted and sentenced for an offence under s. 165 of the Penal Code. His appeals to the Court of Appeal and the Federal Court were not successful. The sentence of one year imprisonment and order of the forfeiture of the property pursuant to s. 36(1) of the Anti-Corruption Act 1997 against the first defendant was affirmed by the Federal Court, as evidenced in the order dated 29 September 2015 (Case No. 05-122-06-2013(B)), a copy of which is exhibited as LMM4 to the affidavit affirmed by Liow Mei Mee, an assistant manager at the collections & recoveries unit of the plaintiff bank. It is therein ordered by the Federal Court that "hartanah dilucuthakkan tertakluk kepada gadaian, jika ada"; or that in the instant case, clearly means that the property be forfeited subject to the charge.

[12] The defendants averred that they had been making prompt and regular payments in accordance with the terms and conditions of the facility agreement, even after the first defendant was charged, but stopped after the proceedings concluded at the Court of Appeal. And with the final order as pronounced by the Federal Court affirming the forfeiture of the property, the defendants thus have taken the position that they are no longer obliged to make payments under the facility since the facility agreement, it is argued, has ceased to have any further effect.

[13] It is difficult to appreciate how the order of the Federal Court, or the underlying criminal proceedings for that matter, could have any relevance to the contractual relationship between the plaintiff and the defendants under the facility agreement which constitutes a facility in the nature of a loan which is secured by a charge over the property. At the risk of over-simplification, the transaction, at its most basic, involves the plaintiff extending the facility which had been utilised by the defendants, and in return, the defendants must repay the facility in accordance with the terms of the facility agreement, and as security for the facility, first provided the property to be subject to the charge.

[14] Although the purchase of the property necessitated the facility, there is nothing in the facility agreement which makes the validity of the facility agreement to be dependent on the continued ownership of the property by the defendants. The defendants have not made reference to any clause in the facility agreement which had such effect, and indeed, based on my review of the facility agreement and the charge annexure, none exists. Which is unsurprising since a clause of such nature cannot be found in standard loan agreements in any event. There is therefore absolutely no basis for the contention that the order of the Federal Court has the effect of extinguishing the facility or the obligations of the defendants to make prompt and punctual payment of the principal and interest sums falling due, owing and payable under the facility.

Second Issue – Whether It Is An Implied Term Of The Facility Agreement That It Is Only Valid For As Long As The Defendants Continue To Own, Control And Occupy The Property

[15] The defendants contended that their continued ownership, control or occupation of the property ought to be construed as being "implied terms" in the facility agreement, and suggested that there were pre-contractual representations made by the plaintiff to the defendants to such effect.

[16] I find this assertion to be unmeritorious. First, no evidence whatsoever has been proffered by the defendants to support their contention of the existence of such representations. Secondly, it is unusual, if not totally unheard of for lenders to agree that repayment obligations of the borrowers would be extinguished if for some reasons, they cease to own or occupy the property subject to the charge in favour of the lenders.

[17] Thirdly, this contention offends against the best evidence rule contained in ss. 91 and 92 of the Evidence Act 1950. The former excludes the admission of oral evidence for proving the contents of document reduced in writing such as the facility agreement, and the latter excludes the evidence of oral agreements to contradict the terms of a document which has been produced to prove its terms under the former. In the instant case, the obligation of the defendants to repay is manifestly stated in the facility agreement. Thus, for instance, cl. 1 of the facility agreement on 'covenant to pay' stipulates that in consideration of the plaintiff agreeing to grant to the defendants the facility, the borrower:

> HEREBY AGREES COVENANTS UNDERTAKES with the Bank to repay to the Bank ON DEMAND by notice in writing of the Bank made to the Borrower:
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> (i) the outstanding under the Facility which includes without limitation all sums of money which are now or shall from time to time be due and owing by the Borrower to the Bank (at any of the Bank's branches) whether certain or contingent or incurred to the Bank from or by the Borrower anywhere on any or on any current loan or other account or accounts or in any manner whatsoever and interest thereon as calculated in the manner herein below provided; …

[18] The facility agreement (or the charge annexure) contains no qualifications for such repayment obligations. There is nothing that permits the defendants to be released of their obligation on the grounds even remotely related to their no longer owning or residing in the property. In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 Chang Min Tat Ming FJ clearly stated in referring to ss. 91 and 92 of the Evidence Act 1950 as follows:

> … it means where the terms of a contract have been reduced to writing, as in this particular agreement they had been, the contract could only be proved by the document itself, and it is not open to the respondent to seek to introduce and the judge to admit evidence that would, *inter alia*, add new terms to it.

[19] Neither could such a term be implied into the facility agreement. On this, even though the plaintiff relied on the decision of the Court of Appeal in *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 CLJ 23; [1997] 1 MLJ 587 to support its contention against the incorporation of the said implied term, I would consider the decision of the Federal Court on the same case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151) to be, quite naturally, of greater authority, where Peh Swee Chin FCJ held as follows:

> Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contact. The implied term contended for in this appeal belongs to this type and much more about this later.

The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law, I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts. Such *ratio decidendi* in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus, such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide a safe system of work. Many of such decided and specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasise that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly, it is not dependent on the court having to draw an inference explained above.

The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s. 92(e) the Evidence Act 1950 seems to be custom-made to provide logistical support for this particular type of implied term. It will be remembered that s. 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract.

[20] The contention of the defendants that it is an implied term of the facility agreement that it only binds the defendants for as long as they remain the owner or continue occupying the property would be one that could conceivably come within the scope of the first category of implied term. The judgment of Peh Swee Chin FCJ in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* then went on to explain the first category of implied term, as follows:

Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v. Southern Foundries* (1926) Ltd [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common "Oh, of course".

The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v. Cooper* [1941] AC 108 at p 137, that in regard to an implied term, '… it can be

A predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was B held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10 year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have intended it at the time when making C the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd & Anor* [1918] 1 KB 592 at p 605 as '… of course, so and so will happen, we did D not trouble to say that, it is too clear'.

Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor* [1977] AC 239 at p 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale E in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not F necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.

The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the G contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained. In doing so, I will not set out the evidence below in detail except to refer to such parts of it as and when necessary, as after all, this matter is not likely at all to go elsewhere from this court, as long as the parties and their counsel and the courts below are apprised of detailed facts.

H **[21]** I do not think it can truly be contended that the twin tests, conjunctively read, for the inclusion of an implied term, can be fulfilled in the instant case. No officious bystander would testily say "oh, of course!" or words to such effect, to the idea that the liability of the defendants under the facility agreement would be affected by whether or not they remain as I owner or in occupation of the property. There is no evidence at all to justify

me making the inference that the plaintiff and the defendants must have intended to include such a term. The officious bystander would in my view be at a loss and completely bewildered when posed with such a contention such that the response would more likely than not instead be the complete opposite – "of course not!", and probably even expressed more testily than expected, in reply. Neither can the contention be in any conceivable fashion be characterised as necessary to give effect to the business efficacy of the facility agreement. Again, if anything, considering the nature of the facility agreement, the effect would be the reverse.

[22] The argument of the existence of implied terms must also fail because it is so well established that where the terms of a contract are clear and not ambiguous, as mentioned, extrinsic evidence cannot be introduced to contradict the contract. Instead, the court is required to construe the contract in its literal and natural meaning, and within the four corners of the document in order to give effect to the intentions and bargains of the parties. Gopal Sri Ram FCJ in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 instructively set out the guideline in the interpretation of contracts in the following terms:

> Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.

[23] It is thus the imputed intention of the contracting parties that matters, in order to appreciate the meaning of the agreement which must be ascertained from the words which parties have employed, when read in the context of the circumstances in which they executed the contract. But once the construction is clear, the court cannot improve on the contract. In the same case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd*, Gopal Sri Ram FCJ approvingly referred to the following passage from the judgment of Lord Hoffman, delivering the decision of the Privy Council in *Attorney General of Belize & Ors v. Belize Telecom Ltd* [2009] UKPC 10:

> The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the

A background knowledge which would reasonably be available to the audience to whom the instrument is addressed. See *Investors Compensation Scheme Ltd v. West Bromwich Building Society, Investors Compensation Scheme Ltd v. Hopkins & Sons (a firm) & Ors, Alford v. West Bromwich Building Society & Ors, Armitage v West Bromwich Building Society & Ors* [1998] 1 All ER 98 at pp 912–913 [1998] 1 WLR 896. It is this objective meaning which is
B conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[24] The Court of Appeal in *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337 had also most relevantly held as follows:

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> [27] It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in cl. 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the *Central Bank of India Ltd, Amritsar v. Harford Fire Insurance Co Ltd* AIR [1965] SC 1288 it was held that:
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> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give
> E effect to the plain meaning of the words however much it may dislike the result.

[25] A similar outcome was arrived at in the decision of the Court of Appeal in *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294; [2003] 4 MLJ 357.

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[26] No less significantly, it would not be correct in principle for the defendants to in effect raise an objection to the plain language of the facility agreement which they had previously accepted in writing without complaint and indeed had benefited from. In *Malayan Banking Bhd v. Chua Keng Leng* [1991] 3 CLJ 2522; [1991] 3 CLJ (Rep) 224 the High Court held that:

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> Parties ought to admit facts as to which there is no controversy. A defendant should not deny plain and acknowledged facts which it is neither in his interest nor in his power to disprove. In an action for a debt a mere denial of the debt is wholly inadmissible.

H **[27]** Given that the terms and conditions of the facility agreement are clear and free from any ambiguity (neither have the defendants identify any terms deemed lacking in clarity), it must follow that the court is bound to give effect to the bargain made between the parties as encapsulated within the terms of the facility agreement and the charge annexure. There is no basis
I for the incorporation of any implied term. Further, the alleged events prior to the entry of any contractual relationship between the parties, including any

pre-contractual representations, all of which if they genuinely existed, the plaintiff is neither a party nor privy to, are in any event entirely unsubstantiated, and are also wholly irrelevant to the facility agreement and the charge.

[28] As such, the argument of the defendants on the existence of an implied term which is asserted to have the effect of releasing the defendants from the obligations under the facility agreement upon forfeiture of the property is devoid of merits and entirely unsustainable. It plainly thus does not amount to a triable issue.

Third Issue – Whether The Facility Agreement Is Frustrated By Reason Of The Forfeiture Of The Property

[29] The defendants submitted that the finality of the order of the Federal Court directing the forfeiture of the property had the effect of cancelling the facility agreement and the charge on the basis of the law on frustration of contract under s. 57(1) and (2) of the Contracts Act 1950, which read as follows:

> **57 Agreement to do impossible act**
> (1) An agreement to do an act impossible in itself is void.
>
> **Contract to do act afterwards becoming impossible or unlawful**
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[30] I do not think it can be doubted that given the fact of the forfeiture of the property following the order of the Federal Court, the property is no longer legally under the ownership of the defendants. However, this change in status of property ownership does not in the slightest affect the promised obligations of the parties under the facility agreement and the charge. I say this for two principal reasons.

[31] First, the obligation of the defendants is to repay, on the basis of the loan that had been extended for their benefit. That obligation remains intact. Such obligation on the part of the defendants under the facility agreement and the charge are not and cannot be affected by the mere fact that the property is now owned by the Government instead of the defendants. The provision of security is an obligation imposed on the defendants as borrowers. It is for the benefit of the plaintiff as lender.

[32] Even if the property ceased to be subject to the charge (which is clearly not the case), there is still no plausible basis for the obligation to repay to similarly discontinue. If anything, it would be for the plaintiff to exercise its right under the terms of the agreement either to waive the requirement for the security altogether or insist on the provision of a replacement security, failing which, the defendants could even be subject to the recall of the

facility. As is common, it was the defendants who had given warranties and representations in respect of the property in the facility agreement in order to ensure the continued existence of the charge over the property, and its creditworthiness for security coverage purposes.

[33] The contract in the facility agreement and the charge is for the defendants to make payments to the plaintiff in consideration of the loan granted to them by the plaintiff. There is absolutely nothing to prevent the defendants to continue making payments to the plaintiff in accordance with the terms of the facility agreement. The facility agreement and the charge are not frustrated by the forfeiture. The fallacy of the defendants' argument would be plainer if it is assumed that the loan had been given on a clean basis, without any security. The plaintiff has performed its part of the bargain by having granted the facility. The defendants must perform theirs in continuing to make payments. The fundamental principle of the sanctity of contract is meant to be honoured by contracting parties, and must therefore be upheld.

[34] The second reason is that in any event, the property continues to be the security for the facility under the charge even though it is no longer belonging to the defendants. This is manifest from the order of the Federal Court mentioned earlier. Hence, the plaintiff is rightly unconcerned about the status of the security arrangement for the facility notwithstanding the conviction of the first defendant and the forfeiture of the property since the charge in favour of the plaintiff remains intact. The only change is the refusal of the defendants to continue making repayments.

[35] Accordingly, there is no frustration of contract since there is absolutely nothing that operates as a supervening element that prevents the defendants from making payments to the plaintiff of the outstanding sums in accordance with the agreed terms in the facility agreement and the charge. The property, the security over it, and the forfeiture of the property are all entirely irrelevant to the obligations of the defendants as borrowers under the facility agreement. Their refusal to adhere to their payment obligation is a clear case of an intentional breach of contract. There is palpably nothing impossible about performing their obligation under the facility agreement. Thus, s. 57 of the Contracts Act 1950 is of no application to the situation encountered by the defendants.

[36] Even if the case of the defendants is, in this context, taken at its highest and it is assumed that somehow there was an impossibility of performance by reason of the forfeiture of the property (which of course there is none), this is, on evidence, not a frustration of contract under the law.

[37] Under s. 57 there are two types of frustration. The first is an event that makes the contract impossible of performance, and the second is the event of supervening illegality. The argument of the defendants suggests that the

forfeiture could lead to at least the first type, in the sense that the loss of ownership in the property meant that it would be impossible to continue performance of the facility agreement. This is of course as shown earlier, an argument without substance, but is only pursued in this context only to demonstrate further the extent of its irrelevance.

[38] This is because the law is clear in not recognising frustration if it is attributed to the party asserting the same. The concept is essentially concerned with a situation where a contract becomes impossible or illegal to perform because of a supervening act. This act must be one which is not in any manner caused by any of the parties. Otherwise, a party seeking to extricate itself from his own promises as embodied in a validly concluded contract could, to the extent possible in any particular case, orchestrate or concoct what becomes a supervening impossibility that frustrates the contract. Further, as the words in s. 57 make clear, it is not a frustration if the supervening illegality could be prevented by a party to the contract.

[39] This is made abundantly clear by Gopal Sri Ram JCA (as he then was) in *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666 where he said:

> Now, it is well-settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. Another way of putting it is that self-induced frustration is no frustration. See, *Dato' Yap Peng & Ors v. Public Bank Bhd & Ors* [1997] 4 CLJ 115 (refd) [1997] 3 MLJ 484. The Master of the Rolls dealt with the point in *Ocean Tramp Tankers v. V/O Sovfracht (ibid)* as follows (at p. 165):
>
> > The second question is whether the charter-party was frustrated by what took place. The arbitrator has held that it was not. The judge has held that it was. Which is right? One thing that is obvious is that the charterers cannot rely on the fact that the Eugenia was trapped in the canal; for that was their own fault. They were in breach of the war clause in entering it. They cannot rely on a self-induced frustration; see *Maritime National Fish Ltd. v. Ocean Trawlers Ltd*. [1935] AC 524.
>
> So too here. The refusal of the Exco to alienate the lands in question was a deliberate act of non-compliance of the consent order by a party to the first action. It was not a supervening event at all. In these circumstances, it is not open to the instant respondents to rely on the doctrine. The doctrine of frustration has absolutely no application whatsoever to the fact pattern that forms the core of this appeal.

[40] The forfeiture is a direct and specific consequence of the conviction of the first defendant under the Penal Code. The forfeiture cannot therefore be characterised as other than a fact brought about by or attributed directly to the first defendant and no other. It was the first defendant's own fault.

Thus, if this was a 'frustration', it was definitely one which is self-induced by the first defendant, and falls outside the ambit of s. 57 of the Contracts Act 1950.

[41] Thus, not only is there no frustration since the defendants can perfectly continue to perform their obligations under the facility agreement; but that even if there was a frustration, it would not assist the defendants since it was clearly one that was self-induced. Accordingly, this argument on frustration too, fails for being considerably lacking in substance.

Fourth Issue – Whether The Plaintiff Should First Pursue The Foreclosure Of The Charge Before Suing The Defendants

[42] The defendants contend that the failure of the plaintiff to enforce the charge before initiating the present suit raises a question of law that ought to be tried. I think the true position in law is quite the reverse. It is already trite law that following a default, a lender is fully entitled to pursue any of its remedies either concurrently or successively, unless there is an agreement to the contrary. In the instant case, s. 18 of the facility agreement states as follows:

> **18. Simultaneous Actions**
>
> The remedies available to the Bank hereunder upon default by the Borrower if so enforced by the Bank shall be without prejudice to any other remedy or remedies available to the Bank by virtue of law or any other security arrangement or agreement between the Bank and the Borrower or any third party or parties and the Bank shall be entitled to take all necessary actions including but not limited to the simultaneous commencement of action/actions to obtain judgment and/or to proceed with the simultaneous enforcement of one or more security including the security hereunder.

[43] A similar clause is found in s. 15 of the charge annexure. In both clauses, there is no agreement compelling the remedy of enforcing the charge to be first initiated by the plaintiff. In any event, the nature of the two proceedings is manifestly different. The instant action arises from a breach of contract which is a suit *in personam*, a common law action whilst a foreclosure is an action *in rem*, being a statutory action under the National Land Code.

[44] In addition, the law on this issue is free from any ambiguity. As I have stated in *Bank Simpanan Nasional v. Tham Lai Ling* [2016] 6 CLJ 880, the Federal Court in *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81 made it clear that its earlier decision in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 had already established that a chargee or creditor may at its option pursue all its remedies to recover monies lent by him either simultaneously, contemporaneously or successively, unless there is agreement to the contrary.

[45] It is instructive to note that the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 had ruled in the following terms:

> Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings *in rem* under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively.

[46] In the subsequent case of *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81, the Federal Court reaffirmed this position by crystal clearly holding as follows:

> [8] We would reiterate that a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary.

[47] In the instant case, as demonstrated above, the contractual term instead plainly provides for the right of the plaintiff to pursue the various remedies concurrently. There is no requirement that the plaintiff must pursue any specific remedy such as foreclosure prior to resorting to any of the other options. As such this argument is misconceived and bereft of merit. It does not constitute a triable issue.

Fifth Issue – Whether The Plaintiff Should Have Taken Steps To Enforce Its Rights Under The Charge Vis-à-vis The Government

[48] There appears to be some degree of overlap between this issue and the immediately preceding argument referred to above but the written submissions of the defendants suggest (the point was not raised at the hearing) that the plaintiff should exercise its rights and enforce the charge in order to ascertain the meaning of the order of the Federal Court which specified "hartanah dilucuthakkan tertakluk kepada gadaian, jika ada".

[49] In my view, the meaning of the order of the Federal Court on these words is plain and obvious. Its literal and natural meaning also accords with business and common sense. It surely must mean that the property is forfeited subject to the charge, in that ownership is forfeited and transferred, from the defendants to the Government, but the new ownership is established subject to the charge over the property which was already pre-existing at the time of the forfeiture. The charge is well and truly intact. It continues to act as a security for the benefit of the plaintiff as chargee under the charge.

[50] And based on the case-law authorities and the pertinent clauses found in the facility agreement and the charge annexure referred to above, the plaintiff can decide to take action to enforce the charge as it deems fit in

accordance with the terms therein. There may possibly be a greater motivation for the plaintiff to pursue a civil claim as presently first, since following the forfeiture, the only claim against the defendants is the *in personam* action for recovery of the indebtedness under the facility. But this would be entirely for the plaintiff, as it is fully entitled, to consider and decide on.

[51] There is, as such, no necessity whether pursuant to the order of the Federal Court or otherwise, for the plaintiff to take any legal or validating steps to assert or affirm its rights as chargee in respect of the charge of the property. Accordingly, there is no substance in this contention of the defendants. This is not a triable issue.

Sixth Issue – Whether The Order Of The Federal Court On The Forfeiture Being Subject To Charge Is Meant To Protect The Interest Of The Plaintiff And The Second Defendant

[52] In their written submissions, the defendants asserted that in view of the order of the Federal Court, concerning the charge, the parties who had an interest in the property are the plaintiff and the second defendant, against whom there was no charge or conviction. Both were not called to testify in the criminal proceedings against the first defendant. The defendants in para. 30 of their written submissions then submitted that the order of the Federal Court was clear in safeguarding the interests of the plaintiff and the second defendant. But in the immediately subsequent para. 31, the defendants queried whether the order of the Federal Court truly had such effect, and thus argued that this would be a question of law to be tried.

[53] The lack of coherence in the defendants' presentation of arguments aside, I do not consider there is any ambiguity whatsoever in the meaning (as explained above) and the effect of the order of the Federal Court. The order forfeits the property. The registered and legal ownership of the defendants, both the first and second defendants, of the property under the law – the National Land Code, extinguished upon the making of the order of the Federal Court.

[54] The co-ownership by the second defendant of the property did not survive the forfeiture. After all, the property, in its entirety, is the subject matter of the offence for which the first defendant had been convicted and sentenced, and which formed the basis for the invocation of the power of forfeiture under s. 36(1) of the Anti-Corruption Act 1997 in the first place.

[55] Thus, it is not correct for the defendants to state that the order of the Federal Court was to protect the interest of the second defendant. The second defendant is a co-borrower, and is equally bound by the expressed promises made by her in the facility agreement and the charge.

[56] The stance taken by both defendants, as borrowers, not to make payments to the plaintiff of the amounts due under the facility resulted in the default which had entitled the plaintiff to commence the writ action and the instant proceedings against both defendants. The defendants are however correct in stating that the order of the Federal Court protects the interest of the plaintiff, since the existence of the charge is expressly preserved.

[57] There is therefore no merit in this contention of the defendants, and no triable issue arises as a result.

Seventh Issue – Whether The Government Should Be Made A Third Party

[58] The defendants further contended that since the Government had secured the forfeiture of the property upon the conviction of the first defendant, the Government should be made a third party to explain the status of the charge and the property. This thus amounts to a triable issue, so the defendants asserted.

[59] Again, at the risk of repetition, this application and the underlying suit is an action initiated by the plaintiff bank to claim the outstanding sum under the facility owed by the defendant borrowers. The status of the security does not affect the obligation of the defendants to make payments of relevant sums under the facility agreement.

[60] The fact that the property subject to the charge has been forfeited does not change the contractual promises made by the parties. Indeed the position of the plaintiff is clearly stated to be in no worse off position since the charge continues well and truly in place for its benefit as manifestly specified in the order of the Federal Court. Thus, the Government has nothing to do with the contractual relationship between the plaintiff and the defendants.

[61] If the defendants had issues with or need clarity from the Government, it is absolutely of no relevance to the plaintiff or to this application for summary judgment. In *Malayan Banking Bhd v. Karnival Dagang Sdn Bhd & Ors* [2012] 1 LNS 605; [2013] 4 MLJ 756, the Court of Appeal, in reversing the decision of the High Court dismissing the bank's summary judgment application against the borrower, held that any dispute between the borrower and a third party is wholly irrelevant and does not raise any triable issue *vis-a-vis* the borrower's liability to repay the facilities granted by the bank to the borrower under the relevant loan agreement.

[62] Thus, the above position should similarly obtain in the instant case. As such, this argument of the defendants, patently devoid of merit, does not amount to a triable issue.

A **Additional Observations**

[63] It should also be mentioned that the defendants had not shown any evidence to challenge the correctness of the certificate of indebtedness issued by the plaintiff on 10 June 2016, in respect of the outstanding sum, as at 14 June 2016 of RM2,400,697.85. As I stated earlier, their argument was
B primarily on the forfeiture of the property, instead of questioning the accuracy of the amount of indebtedness. This does little to advance the case of the defendants, for the law is clear on the effect of a certificate of indebtedness.

C **[64]** The provision on certificate of indebtedness is contained in cl. 38 of the facility agreement which provides that a statement by the plaintiff as to any amount due under the facility shall be final and conclusive. It is an established principle of law as affirmed by the Federal Court in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685 that when a conclusive certificate of indebtedness is issued, such a certificate
D shifts the burden onto the defendant to disprove the claim.

[65] The defendants had not shown inaccuracy in the certificate, let alone any manifest error. The conclusiveness and accuracy of the indebtedness and liability of the defendants to the plaintiff in the instant case therefore stands
E undisputed.

[66] Above all, the case of the defendants is also riddled with averments which are not substantiated. These are bare averments without real support. No documents were produced by the defendants to corroborate their stance on virtually all the arguments to challenge this summary judgment
F application.

[67] It is trite that bare denials or mere assertions do not constitute evidence and they cannot give rise to triable issues (see the Court of Appeal decision in *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690; [1995] 2 MLJ 363). To the extent that these arguments
G were formulated as involving questions of law, these have also been shown to be not tenable and plainly unmeritorious.

[68] Reference should also be made to the leading judgment of the former Supreme Court on summary judgment application in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14
H which held as follows:

> Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary
I documents or other statements by the same deponent or is inherently

> improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[69] Having evaluated the facts arising from and examined the law applicable to this instant case, I have, in the foregoing, determined that the defendants have so plainly failed to raise any triable issue or reasonable defence. I additionally find that all the arguments raised by the defendants to be entirely at variance and not consistent with either the clear position in law or the undisputed contemporary documents, being the facility agreement and the charge governing the facility. The resistance of the defendants to this application is futile and must therefore fail.

Conclusion

[70] For the reasons that I have discussed in the foregoing, I find that the defendants have fallen very considerably short, and thus not succeeded, on a balance of probabilities, in demonstrating that they had any triable issue to resist the plaintiff's summary judgment application. Accordingly, I allow encl. 4 and grant the O. 14 summary judgment for the plaintiff, with costs.